defer codification of actual coordination obligations until such time as they may actually be needed. Moreover, TRW fully supports the Commission's ongoing effort to interpret Radio Regulation 2613 in a way that does not relegate U.S. non-geostationary systems to secondary status with respect to foreign geostationary FSS systems.[214/]

TRW remains concerned, however, that the Commission may consider taking actions in this and other proceedings that could jeopardize the ability of non-geostationary systems to share FSS frequencies with geostationary systems. When TRW filed its application in May 1991, only one geostationary FSS system (i.e., Norris Satellite Corporation) had been authorized by the Commission to use frequencies in the 27.5-30.0 GHz and 17.7-20.2 GHz bands, and only Motorola had an application pending for authority to use the bands.[215/] Within the last fifteen months or so, however, circumstances have begun to change.

214/ In particular, the Commission cited the Committee's conclusion that:

> RR 2613 will not be invoked to require a LEO system to terminate operations unless: (1) the affected administrations reach agreement as to a level of "accepted interference;" (2) the LEO system is operating in excess of these levels; and (3) the excess interference is caused by the LEO satellite's failure to maintain sufficient angular separation between the satellites.

Id. at 1130 (¶ 73) (footnote omitted).

215/ The proposals of TRW and Motorola do not overlap in these bands, and are thus not mutually exclusive in this particular respect.

First, in 1993, the Commission proposed to allocate the lower two gigahertz of the 27.5-30.0 GHz band (i.e., the spectrum at 27.5-29.5 GHz) to the terrestrial Local Multipoint Distribution Service ("LMDS") on a co-primary basis -- and presented a somewhat bleak, albeit preliminary, assessment of the prospects for spectrum sharing between satellite and LMDS users.[216/] In addition, within the last few months, two new FSS applications have been filed for satellite systems in the 27.5-30.0 GHz and 17.7-20.2 GHz bands.[217/] Finally, the Commission announced in its NPRM that it expects in the instant proceeding "to be able to identify sufficient spectrum within [the 27.5-30.0 GHz] band to satisfy the Earth-to-space feeder link

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216/ See Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, (Notice of Proposed Rule Making, Tentative Decision, and Order on Reconsideration), 8 FCC Rcd 557 (1993) ("LMDS NPRM"). In the LMDS NPRM, the Commission stated that "the multicell multipoint configurations in this proposal envision a wide area distribution of services which may foreclose the possibility of acceptable sharing conditions between satellite and terrestrial services." Id. at 560.

217/ Late last year, Hughes Communications Galaxy, Inc. ("Hughes") applied for a geostationary satellite system that would operate both in the upper 500 megahertz of the proposed LMDS allocation and in the 500 megahertz at 29.5-30.0 GHz in which TRW would locate the feeder links for its proposed MSS Above 1 GHz system. Hughes's system would also operate in 1000 megahertz of spectrum at 19.2-20.2 GHz, the top portion of which would overlap with TRW's satellite-to-gateway feeder link in the 19.7-20.2 GHz band segment. In March 1994, a new entity called Teledesic Corporation applied for authority to construct a non-geostationary system that would consist of 840 operational satellites in forty different orbital planes. Although the Teledesic system would use 1200 megahertz of spectrum in each direction in the bands proposed for joint allocation to the LMDS and FSS (and the companion downlink band), Teledesic's frequency plan does not appear to conflict with TRW's feeder link plans. Neither Hughes's "Spaceway" application nor the Teledesic non-geostationary FSS proposal has yet to be placed on public notice.

requirements of all MSS Above 1 GHz applicants that may be licensed in [the CC Docket No. 92-166] proceeding."[218/]

To be sure, the Commission has undertaken "to ensure that adequate unencumbered spectrum is available for accommodating both immediate and future feeder link requirements [for MSS Above 1 GHz systems]."[219/] However, it has also recognized that "it does not appear feasible to seek to implement LEO feeder links in bands that are heavily used by GSO systems."[220/]

It is the increasing congestion in the 27.5-30.0 GHz and 17.7-20.2 GHz bands (at least in terms of proposals) that has TRW somewhat anxious that the Commission's conclusions about the prospects for non-geostationary/geostationary sharing of the FSS bands may be called into question for these formerly uncongested bands. These bands, unlike other FSS bands, are not heavily used by geostationary FSS systems, and thus are perhaps most appropriate for use by non-geostationary systems. TRW calls upon the Commission both to finalize its determinations on non-

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218/ NPRM, 9 FCC Rcd at 1131 (¶ 77) (emphasis added). This last development would mean that the three MSS Above 1 GHz applicants that have applied or indicated an intention to apply for feeder links in frequencies in the 5 GHz range may have to be accommodated in the 20/30 GHz bands as well.

219/ Allocation Order, 9 FCC Rcd at 542.

220/ NPRM, 9 FCC Rcd at 1130 (¶ 74) & n.115. The Commission is of the opinion that "[c]oordinating a LEO system with every GSO satellite throughout the world would simply be too burdensome." Id.

geostationary/geostationary sharing, and to proceed with licensing actions in the MSS Above 1 GHz service that include the FSS allocations at 27.5-30.0 GHz.

2. The Commission's Proposed Rule Section 25.203(k) Departs Radically From The MSS Above 1 GHz Negotiated Rulemaking Committee's Proposal For That Rule, And Substantially Alters The Sharing Dynamic Between Non-Geostationary And Geostationary Systems Operating In The FSS Bands.

In its NPRM, as noted above, the Commission stated that it is accepting the Committee's determination that sharing among non-geostationary system feeder links and geostationary systems is feasible with coordination.[221/] Purporting to follow the Committee's recommendation, the Commission went on to "propose only to codify a general obligation to coordinate in Part 25 of the Commission's rules, while deferring the codification of any specific requirements until, and if, the need arises."[222/]

221/ See id.

222/ Id. The Commission does not cite to a specific rule proposal at this point in its discussion, but Proposed Rule 25.278, "Additional coordination obligation for non-geostationary and geostationary satellite systems in frequencies allocated to the Fixed-Satellite Service," appears to fit the bill. This rule provides that licensees of non-geostationary systems that use FSS bands for their feeder link operations shall coordinate with geostationary FSS systems licensed by the Commission for operation in the same frequency bands -- and vice versa. Id. at 1160 (Appendix A, Proposed Rule 25.278).

The Committee's focus on sharing between non-geostationary and geostationary systems stemmed from the existence of Radio Regulation 2613, and its putative impact on international operation of non-geostationary systems in FSS bands shared with geostationary FSS systems. The conclusion advocated was that the regulation did not relegate non-geostationary systems to secondary status with respect to geostationary FSS systems in shared bands, and that three specific preconditions had to exist before non-geostationary systems would be required to reduce or cease transmissions.[223/] The Committee also observed that because its interpretation of Radio Regulation 2613 precluded the application of the regulation to systems licensed by a single administration, the question of domestic regulation was left for the Commission to decide without reference to the international obligation.[224/]

In its Report, the MSS Above 1 GHz Negotiated Rulemaking Committee recommended that for domestic coordination purposes, all that should be included in the Commission's regulations for operators of non-geostationary and geostationary FSS systems licensed or to be licensed by the Commission "is a requirement in Part 25 of the FCC's rules that affected operators coordinate their use of the shared bands. Domestic coordination would occur regardless of whether the geostationary FSS or

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223/ See Committee Report at 29-30. See also id. at Annex 3, pp. 10-11.

224/ See id. at Annex 3, p. 11.

non-geostationary system is the first to be operational."[225/] The Committee recommended the adoption of the language reproduced in the NPRM as Proposed Rule 25.278 to accomplish this objective.[226/]

The Committee also recommended the adoption of a new rule, Proposed Rule 25.203(k), that would build upon and reinforce the coordination obligation by requiring applicants for earth stations in frequency bands to be shared by non-geostationary and geostationary FSS systems to show that they will not cause interference to any operational satellite system, or, in the alternative, to certify that their operations will conform to coordination agreements that have been entered into by extant satellite operators in the band. The recommended rule provided as follows:

> f. Add new subsection (k) to Section 25.203, as follows:
>
> "An applicant for an earth station that will operate with a geostationary satellite or non-geostationary satellite in a frequency band in which a non-geostationary system is (or is proposed to be) licensed for feeder links, shall demonstrate in its application that its proposed earth station will not cause unacceptable interference to any other satellite network that is authorized to operate in the same frequency band, or certify that the operations of its earth station shall conform to established coordination agreements between the operator(s) of the space station(s) with which the earth station is to

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225/ Id. at 30.

226/ See id. at 37.

> communicate and the operator(s) of any other space station(s) licensed to use the band."[227/]

Although the Commission purported to follow the Committee's recommendation that a coordination requirement for shared bands is all that should be included in the Commission's regulations, and indeed proposed to adopt the coordination requirement recommended by the Committee, it made revisions to the Committee's proposed addition of Section 25.203(k) that effectively undermine the equivalence between non-geostationary and geostationary systems in FSS bands that is strived for throughout both the Committee's report and the relevant sections of the NPRM. Specifically, the Commission proposed to adopt the following provision as Proposed Rule 25.203(k) (the differences between the Committee's proposal and the Commission's proposal are shown in red-line form):

> An applicant for ~~an~~ a non-geostationary space station or earth station that will operate with a geostationary satellite or non-geostationary satellite in a shared frequency band in which a non-geostationary system is (or is proposed to be) licensed for feeder links, shall demonstrate in its application that its proposed space or earth station will not cause unacceptable interference to any other satellite network that is authorized to operate in the same frequency band, or certify that the operations of its space or earth station shall conform to established coordination agreements between the operator(s) of the space station(s) with which the earth station is to

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227/ Id. at 37-38.

communicate and the operator(s) of any other space station(s) licensed to use the band.[228/]

What the Commission has done by extending to non-geostationary space station applicants -- but not to geostationary space station applicants -- the obligation to demonstrate that their proposed satellites will not cause unacceptable interference to previously-authorized satellite systems, is to relegate non-geostationary systems in shared FSS bands to secondary status.[229/] Because geostationary space station applicants do not have to make the same showing, they would have relative superiority in the band. This result contravenes the attempt of the Committee to place non-geostationary and geostationary systems on a equal footing in shared bands, and changes the ancillary but important nature of Section 25.203(k) as proposed by the Committee. Moreover, this was done without textual reference or discussion of any kind in the NPRM.

TRW calls upon the Commission to modify Proposed Rule 25.203(k) to read largely as it read when it was included in the Committee's Report. Limiting the rule's scope to one that requires earth stations to conform to existing coordination agreements is what was intended, and is consistent with the entire thrust of the non-

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228/ NPRM, 9 FCC Rcd at 1156 (Appendix A, Proposed Rule 25.203(k)).

229/ The addition of the words "non-geostationary space station" in the first line of the Commission's proposed rule also creates grammatical irregularities that must be cleared up.

geostationary/geostationary satellite sharing issue as dealt with in the NPRM.[230/] The rule should, therefore, be revised to read as set forth in the Committee Report at 37-38, except that the word "operating" should be substituted for "authorized to operate" in the seventh line of the rule. The rule would thus require a showing by each applicant "that its proposed **earth stations** will not cause unacceptable interference to any other satellite network that is **operating** in the same frequency band," -- i.e., it should not require such a showing with respect to all satellite networks as may be "authorized to operate" in the bands, as the current provision reads. There simply is more (and more concrete) information available as to operating systems.

230/ TRW would be amenable to an alternative resolution that would have the Commission strike the term "non-geostationary" from the first line of the proposed rule, and thereby extend it to all space station applicants.

B. THE COMMISSION MUST ENSURE ACCESS TO THE 20/30 GHZ BANDS FOR THOSE MSS ABOVE 1 GHZ APPLICANTS THAT DESIRE SUCH ACCESS FOR THEIR FEEDER LINK OPERATIONS.

1. The Commission Should Not Allow Its Rulemaking Proceeding In CC Docket No. 92-297 To Delay The Licensing Of MSS Above 1 GHz Service Feeder Links In The 20/30 GHz Bands.

Of the five non-geostationary MSS Above 1 GHz applicants, three proposed or contemplated locating their feeder links in the 5/6 GHz bands, and two -- TRW and Motorola -- proposed locating their feeder links in the 20/30 GHz bands. The MSS Above 1 GHz Negotiated Rulemaking Committee was unable to agree that it was viable for the 5/6 GHz bands to be used for feeder links,[231/] but it did conclude that TRW and Motorola should be able viably to use the 20/30 GHz bands as proposed in their applications.[232/]

In its NPRM, the Commission acknowledges the Committee's conclusions as to the two proposed feeder link bands.[233/] As noted above, the Commission also stated that it expects, in the context of its rulemaking proceeding in

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231/ See Committee Report at 30-31. The Committee encouraged the Commission to identify alternative frequencies below 15 GHz for these three applicants to use as feeder link assignments. It also recognized, however, that "[i]f no suitable feeder link bands below 15 GHz are available, these applicants may be required to amend their applications to specify the use of bands above 15 GHz for feeder links . . . ." Id. at 31.

232/ See Committee Report at 30-31, 32-35.

233/ See NPRM, 9 FCC Rcd at 1130-1131 (¶¶ 75-76).

CC Docket No. 92-297 regarding the proposed LMDS, to identify sufficient spectrum within the 27.5-30.0 GHz uplink band and the corresponding downlink band to satisfy the feeder link requirements of all of the MSS Above 1 GHz applicants that may be licensed in this proceeding.[234/]

With respect to those applicants for feeder links in the 5/6 GHz bands, the Commission pledged to continue to pursue bands below 15 GHz for MSS Above 1 GHz feeder links, but stated that it was not prepared "to allow the uncertain availability of these bands to delay the licensing and implementation of MSS Above 1 GHz systems."[235/] It placed these applicants on notice that their desired bands may not be available, and that they may be required to modify their system designs in order to proceed to licensing.

To the extent that the Commission has proposed to assure MSS Above 1 GHz systems access to the 27.5-30.0 GHz and 17.7-20.2 GHz bands for feeder link operations, TRW supports the Commission's NPRM. In particular, TRW applauds the Commission's commitment to expeditious licensing of MSS Above 1 GHz systems, and urges the Commission not to delay system licensing (whether all

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234/ See id. at 1131 (¶ 77). The Commission has sought comment on whether to establish a negotiated rulemaking committee in its CC Docket No. 92-297 proceeding to explore LMDS/satellite sharing issues and develop possible technical criteria for interservice sharing. See Public Notice, "FCC Asks for Comments Regarding the Establishment of an Advisory Committee to Negotiate Proposed Regulations" (released February 11, 1994).

235/ NPRM, 9 FCC Rcd at 1131 (¶ 77).

qualified systems would place feeder links in the 20/30 GHz bands or not) during the pendency of the ongoing rulemaking proceeding (and possible associated negotiated rulemaking) in CC Docket No. 92-297. Instead, the Commission should monitor those proceedings closely, and adopt in this proceeding a specific allocation for MSS Above 1 GHz feeder links.

2. In Recognition Of The Uncertainties Surrounding MSS Above 1 GHz Feeder Links, The Commission Should Permit Applicants To Amend Their Feeder Link Proposals Without Fear Of Dismissal Pursuant To 47 C.F.R. § 25.116.

As a final matter, TRW observes the state of flux that currently characterizes the Commission's policies toward feeder link assignments for the MSS Above 1 GHz applicants. With the pendency of the Hughes and Teledesic applications for 20/30 GHz systems, and the prospect that one or more systems may need to modify their feeder link requests to accommodate the Commission's proposed geographic coverage requirements or to adjust to a band segmentation scheme, it may be necessary for one or more applicants to file such requests on relatively short notice (e.g., 30 days' notice if the two referenced applications are placed on notice as accepted for filing).

To reflect these concerns in a way that does not unnecessarily impinge upon the ability of the MSS Above 1 GHz system applicants (who otherwise remain

mutually exclusive) to adjust to changes in this fast-moving environment, TRW urges the Commission to clarify that MSS Above 1 GHz applicants may modify their feeder link requests (which are not mutually exclusive with each other in any way) without fear of implicating the "major amendment" proscription of 47 C.F.R. § 25.116. This proposal is consistent with the Commission's stated intention to assure the availability of sufficient spectrum for MSS Above 1 GHz feeder links, and with its desire to accommodate the feeder link requirements of all five applicants in the 20/30 GHz bands, if necessary. Moreover, it does not impact in any way upon the resolution of the mutual exclusivity that currently exists in the MSS/RDSS bands.

V. SERVICE RULES

A. MSS ABOVE 1 GHZ SERVICE SHOULD ONLY BE CLASSIFIED AS CMRS WHEN PROVIDED DIRECTLY TO END USERS.

1. Introduction

In new Part 20 of the Commission's rules, commercial mobile radio service ("CMRS") is defined as:

> A mobile service that is: (1)(A) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (B) an interconnected service; and (C) available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (2) the functional equivalent of such a mobile service described in paragraph (1).[236/]

Because at least some services provided over MSS Above 1 GHz systems may be offered for profit, may constitute "interconnected service" under the definition of that term in Part 20,[237/] and may make service available "to the public," or "to such

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236/ Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1516 (1994) (Appendix A, new Section 20.3) ("Regulatory Treatment of Mobile Services").

237/ See id. at 1516-17. The new rules define interconnected service as:

> A service (1) that is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to

(continued...)

classes of eligible users as to be effectively available to a substantial portion of the public" as the Commission has defined those terms,[238/] it is likely that some MSS Above 1 GHz services will constitute CMRS.

TRW urges the Commission to keep in mind, however, that a substantial amount of MSS Above 1 GHz service may not meet the definition of CMRS. As both MSS Above 1 GHz licensees and resellers of space segment capacity may sell or lease such capacity to parties who are not themselves "end users," and as they would therefore not be providing service to the public or "such classes of eligible users" as to make the service "effectively available to a substantial portion of the public," they should not under such circumstances be found to be providers of CMRS.[239/] In

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[237/](...continued)

> communicate to or receive communication from all other users on the public switched network; or (2) for which a request for such interconnection is pending pursuant to Section 332(c)(1)(B) of the Communications Act, 47 U.S.C. § 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.

[238/] See id. at 1439-1442.

[239/] The Commission has not defined the term "end users" as it pertains to users of CMRS. The term also does not appear in Congress' recent amendments to the Communications Act or in the Explanatory Statement to those amendments. See OBRA at (107 Stat.) 395-96 (to be codified at 47 U.S.C. §§ 153(n) & 332); H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 495-97 (1993), reprinted in 1993 U.S.C.C.A.N. 1088, 1184-1186. TRW requested clarification of the term "end

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any event, the Commission has held that because Congress did not prohibit it from continuing "to determine whether the provision of space segment capacity by satellite systems to CMRS providers [should] be treated as common carriage," it will "continue [to use its] existing procedures" to determine whether the sale or lease of space segment capacity by any entity "shall be treated as common carriage,"[240/] to the extent that such entity is "not providing CMRS directly to end users."[241/]

In the following sections, TRW demonstrates why MSS Above 1 GHz service licensees should not be required to operate as common carriers to the extent that they may offer satellite capacity to CMRS providers.[242/] TRW also offers comments in response to the Commission's inquiry as to how to regulate MSS Above 1 GHz space station operators that do offer CMRS.[243/]

239/(...continued)
users" in the Commission's proceeding on the regulatory treatment of mobile services. See Comments of TRW Inc., GN Docket No. 93-252 (Nov. 8, 1993), at 21-23. It is TRW's understanding that in using the term "end users," the Commission is referring to customers of commercial mobile service as defined in Section 332(d)(1) of the Act and in newly amended Part 20 of its rules, i.e., "the public" or "such classes of eligible users as to be effectively available to a substantial portion of the public." In using the term "end users" throughout these Comments, TRW intends to employ this definition.

240/ Regulatory Treatment of Mobile Services, 9 FCC Rcd at 1456.

241/ Id. at ¶ 1457.

242/ See NPRM, 9 FCC Rcd at 1133-34 (¶¶ 80-81).

243/ Id.

2. MSS Above 1 GHz Space Station Licensees Making Satellite Capacity Available to CMRS Providers Should Not Be Treated As Common Carriers.

In applying for authority to construct Odyssey, TRW stated explicitly that it will "offer Odyssey capacity on a non-common carrier basis to service providers."[244/] As the Commission observes in its NPRM,[245/] it has previously made determinations regarding common carriage obligations by examining individual service proposals in light of the criteria delineated in National Association of Regulatory Utility Commissioners v. FCC.[246/] The court in NARUC I established two criteria for determining whether a service may be provided on a non-common carrier basis: (1) Whether there is or should be any legal compulsion to serve the public indifferently, and (2) if not, whether there are reasons implicit in the nature of the service to expect an indifferent holding out to the eligible user public.[247/] Under neither criterion does the provision of space segment capacity to CMRS providers qualify as common carriage.

244/ Odyssey Application at 20.

245/ See NPRM, 9 FCC Rcd at 1133 (¶ 80).

246/ 525 F.2d 630, 642 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) ("NARUC I").

247/ See NPRM, 9 FCC Rcd at 1133 (¶ 80) (paraphrasing NARUC I, 525 F.2d at 642).

a. There Is Not And Should Not Be Any Legal Compulsion On MSS Above 1 GHz System Licensees To Serve "The Public" Indifferently.

There is clearly no current legal compulsion on MSS Above 1 GHz space station operators to serve the public indifferently. Congress gave the Commission discretion to continue to determine whether the provision of space segment capacity to CMRS providers should be treated as common carriage or not, and, as previously noted, the Commission has held that it will use its existing procedures to make that determination on a case-by-case basis. In advance of the Commission's determinations, no legal compulsion can be said to exist.

There is also no reason for the Commission to impose such a legal compulsion on MSS Above 1 GHz space station operators, and every reason not to do so. The danger of unreasonable or anticompetitive practices that common carrier regulation was designed to prevent simply will not exist in the competitive environment in which MSS Above 1 GHz system licensees will operate. The fact that there are five applicants for authority to launch MSS Above 1 GHz service systems presages vigorous competition in this emerging field. Furthermore, the Commission has asserted its commitment to the establishment of an MSS Above 1 GHz service that is characterized by multiple entry and meaningful intraservice competition.[248/] Given the numerous alternatives that CMRS providers will have to access MSS/RDSS

248/ See Allocation NPRM, 7 FCC Rcd at 6417.

space segment capacity, there will be no "bottlenecks" in the provision of space segment capacity that could be controlled by any prospective licensee. Under such circumstances, any inefficiencies in price or quality on the part of an MSS Above 1 GHz system will quickly cause a migration of business from that system to other systems.

The Commission has held in the past that the monopolistic position of a single MSS licensee may require the imposition of some degree of common carrier-type regulation.[249/] Where competitive alternatives for access to space segment are available to consumers, however, the Commission has granted applicants for satellite licenses the opportunity to offer capacity on either a common carrier or a non-common carrier basis.[250/] With competition among MSS Above 1 GHz licensees, there neither is nor should be a common carriage requirement imposed on systems that make space segment capacity available to CMRS providers.[251/]

249/ See LMSS Report and Order 2 FCC Rcd at 489-90. Even in this extreme case, however, the Commission found that the existence of competing technologies, the developmental stage of MSS and the Commission's open access requirement required the conclusion that "imposing the full panoply of common carrier regulation on the MSS licensee is unnecessary at this time." Id. at 490.

250/ In its NVNG MSS Order, the Commission used its discretion under revised Section 332(c)(5) of the Act to find that the three applicants for NVNG MSS space station licenses would not be required to provide system access to commercial mobile service providers on a common carriage basis. See NVNG MSS Order, 8 FCC Rcd 8450. The Commission noted that it had previously found NVNG MSS services not to be inherently common carrier in nature under the test in NARUC I. Id. at 8456-57.

251/ For the same reasons, the treatment of the provision of space segment capacity to (continued...)

b. Nothing Implicit In MSS Above 1 GHz Service Creates The Expectation Of An Indifferent Holding Out To The Eligible User Public.

Just as there is not and should not be any legal compulsion on MSS Above 1 GHz licensees to serve the public indifferently, there is also nothing implicit in the nature of their provision of satellite capacity to CMRS providers that requires an indifferent holding out of service "to the eligible user public" under the second prong of the NARUC I test. In fact, in most cases, MSS Above 1 GHz licensees will provide no service directly to the public at all.

MSS Above 1 GHz space station operators will not serve "the public," unless they provide service directly to end users of CMRS. Rather, they will serve CMRS providers, by providing them with space segment capacity to sell or lease to resellers or to the public.[252/] Specifically, TRW and other MSS Above 1 GHz

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[251/](...continued)
CMRS providers as non-common carriage does not necessitate the imposition of license conditions pursuant to Titles 1 and 3 as suggested by the Commission in its NPRM. See NPRM, 9 FCC Rcd at 1134 (¶ 81). Such conditions could only be justified by the need to ensure non-discriminatory access to MSS Above 1 GHz space segment. As TRW has demonstrated, CMRS providers will have ample opportunity to gain access to the satellite capacity they require. Any satellite system licensee that discriminates unfairly against resellers and users will quickly find itself forsaken in favor of the many other licensees who will be eager to serve potential clients.

[252/] CMRS providers cannot rationally be considered "the public" as the term was employed in NARUC I. The court in NARUC I held that "[w]hat appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently.'" NARUC I, 525 F.2d at 641 (citations omitted). MSS Above 1 GHz licensees will not "undertake to carry
(continued...)

licensees will negotiate contracts for the sale or lease of space segment capacity with each CMRS provider or capacity wholesaler on an individual basis. This activity, focused as it is on a narrow and specialized group of "customers" and based as it is on individualized agreements that imply no indifferent holding out to the customer group, simply is not the kind of service to which the court was referring in the second prong of the NARUC I test.

The Commission's longstanding policy supports this view. The Commission has authorized numerous applications for satellite systems designed to offer space segment capacity for the provision of service on a non-common carrier basis. In its Transponder Sales decision, the Commission granted the applications of domsat space station licensees to engage in the sale of transponders on their authorized satellites on a non-common carrier basis.[253/] In International Separate Systems, the Commission held that the authorization of satellite systems providing international communications services separate from INTELSAT and operating as non-common carriers would be in the public interest.[254/] In its RDSS Licensing Order, the

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[252/](...continued)
for all people indifferently," or even for all CMRS providers indifferently. Rather, they will make space segment capacity available to CMRS providers on the basis of individualized negotiations.

[253/] See Domestic Fixed-Satellite Transponder Sales, 90 F.C.C.2d 1238 (1982) ("Transponder Sales"), aff'd sub nom. Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

[254/] See International Separate Systems, 101 F.C.C.2d at 1049.

Commission declined to subject the new RDSS to common carrier regulation.[255/] Most recently, and as already noted, the Commission held that NVNG MSS space station licensees would be permitted to provide system access to commercial mobile service providers on a non-common carriage basis.[256/]

There is nothing implicit in the nature of the provision of MSS Above 1 GHz space segment capacity that differs in any way from the services that the Commission chose to treat as non-common carriage in these four decisions. Plainly, then, regulating the provision of space segment capacity by MSS Above 1 GHz system licensees to CMRS providers as non-common carriage would be not only logical and in the public interest, it would be entirely in keeping with Commission precedent. Indeed, in recent years, the only common carrier satellite service established by the Commission is the domestic monopoly MSS service that was licensed to AMSC.[257/]

255/ See RDSS Licensing Order, 104 F.C.C. 2d at 665-66.

256/ See NVNG MSS Order, 8 FCC Rcd at 8456-57.

257/ See Final AMSC Licensing Decision, 7 FCC Rcd 266.

3. Common Carrier Regulation Of The Provision Of MSS Above 1 GHz Space Segment Capacity To CMRS Providers Would Have A Devastating Effect On Foreign Investment.

If the Commission were to impose common carrier status on the provision of MSS Above 1 GHz space segment capacity to CMRS providers, it would also render MSS Above 1 GHz licensees subject to Section 310(b) of the Act.[258/] The Commission expresses particular concern in its NPRM that such regulation "may limit the amount of foreign participation in these inherently global systems, potentially impeding international coordination of these satellites."[259/] The Commission's concern is well-founded.

The inherently global nature of the MSS Above 1 GHz service makes foreign participation in the ownership and operation of MSS Above 1 GHz systems virtually inevitable. Indeed, in order to provide global coverage of the type envisioned by the Commission when it proposed a technical eligibility requirement based on the global coverage capabilities of a proposed system, every MSS Above 1 GHz system will need to locate gateway earth stations on foreign soil -- an activity that will be virtually impossible without foreign investment in the systems themselves.

258/ 47 U.S.C. § 310(b). Under that section, foreign equity investment in certain radio station licensees is restricted, and foreign participation in the management of such licensees is also limited.

259/ NPRM, 9 FCC Rcd at 1134 (¶ 81).

The extensive international regulatory coordination involved, the acquisition and construction of ground segment abroad and the fundamental need to raise sufficient capital to construct, launch and operate the expensive satellite constellations themselves cannot readily be accomplished without foreign investment. As a condition of their investment in global satellite systems, foreign investors quite naturally insist on participation in the systems' construction and/or operation. It is for these reasons that most, if not all, applicants for MSS Above 1 GHz system licenses expect to work with foreign partners in establishing and operating their systems.[260/]

The imposition of common carrier regulation on MSS Above 1 GHz operators, and the concomitant application of Section 310(b) of the Act, would severely limit system licensees' abilities to raise capital for the development and implementation of their respective satellite ventures, as the flexibility of system owners to design creative ownership and marketing structures would be greatly reduced. The result would be a less competitive MSS Above 1 GHz service in which fewer companies would be able to afford entry.[261/] Consumers would feel the

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260/ In recent months, both Motorola and LQSS have announced the reaching foreign partners. Of preliminary financing arrangements with foreign partners.

261/ Global geostationary satellite systems also have found it necessary to form partnerships with foreign companies in order to raise foreign capital. For example, PanAmSat, L.P. consists of two partners -- PanAmSat, Inc. ("PanAmSat"), a U.S. corporation, and Grupo Televisa, S.A. de C.V. ("Televisa"), a Mexican company. See Alpha Lyracom, d/b/a Pan American Satellite, Alpha Lyracom Space Communications, Inc., Cygnus Satellite Corporation, 8 FCC Rcd 376, 376 (1992). Through direct ownership of equity and the interests of their affiliates, PanAmSat and

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impact of such diminished competition in the form of higher prices and fewer service options, results that cannot be said to be in the public interest. In addition, U.S. MSS Above 1 GHz systems would be unable to compete effectively for capital in the global marketplace against foreign satellite systems that are not so constrained. Fewer U.S. MSS Above 1 GHz systems would survive, and the U.S. economy would suffer the consequences of a less favorable balance of trade and fewer domestic jobs.

The imposition of common carrier regulation on MSS Above 1 GHz satellite system licensees would also be likely to limit the systems' abilities to penetrate foreign markets. Commissioner Barrett has cited the prospect of foreign investment in the new NVNG MSS service as a positive result of the Commission's decision to regulate the service as non-common carriage, and has noted the value of foreign investment to NVNG MSS systems as they compete abroad. In a statement that is equally applicable to MSS Above 1 GHz service, Commissioner Barrett observed that "[o]ur [non-geostationary satellite] service providers will need to pursue international coordination efforts where their services extend beyond [the] U.S. Thus,

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261/(...continued)
Televisa each control 50% of the partnership's equity. PanAmSat designates three members of the partnership's managing committee, and Televisa chooses two. Id.